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No. 291

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

MINNESOTA MINING AND MANUFACTURING COMPANY,
Petitioner,

v.

NEW JERSEY WOOD FINISHING COMPANY, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

and

BRIEF OF HIGHLAND SUPPLY CORPORATION AS AMICUS CURIAE

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MOTION OF HIGHLAND SUPPLY CORPORATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Highland Supply Corporation, by its attorneys, respectfully moves for leave to file the annexed brief *amicus curiae* in this case. The consent of the attorneys for respondent has been obtained. Petitioner's attorneys have declined to consent but have stated by letter that they do not "expect to object" to the granting of this motion.

Highland Supply Corporation is directly interested in this case because it is the plaintiff in a treble-damage action now pending in the United States District Court for the Eastern District of Missouri, *Highland Supply Corporation* v. *Reynolds Metals Company,* Civil Action

No. 63 C 53(2), in which exactly the same issue to be determined in this case is presented *i.e.* whether a proceeding before the Federal Trade Commission tolls the four-year statute of limitations under Sec. 5(b) of the Clayton Act, 15 U.S.C. Sec. 16(b). The United States Court of Appeals for the Eighth Circuit in *Highland Supply Corporation* v. *Reynolds Metals Company*, 327 F. 2d 725 (1964), while remanding the case to the District Court on other grounds, decided this issue contrary to the holding of the United States Court of Appeals for the Third Circuit in the instant case thereby creating a direct conflict between the two circuits.

Upon remand movant here filed an amended complaint in the District Court and defendant, Reynolds Metals Company filed a motion to dismiss which was denied in part and granted in part on February 5, 1965.[1]

If this Court affirms the Third Circuit holding in the instant case it will, of course, have the effect of nullifying the conflicting portions of the Eighth Circuit's holdings thereby increasing movant's potential recovery. Movant, therefore, has a direct monetary interest in the decision of this case.

On January 2, 1965 Reynolds Metals Company filed its Motion for Leave to File a Brief *Amicus Curiae* accompanied by its brief in which it seeks, *inter alia*, to broaden the scope of inquiry in the instant case by including a consideration of the issue of whether an order of the Federal Trade Commission may be introduced as *prima facie* evidence under Section 5(a) of

[1] Highland will, of course, seek reconsideration of the *tolling* and *prima facie* questions if this Court affirms the Third Circuit's holdings in the instant case.

the Clayton Act (15 U.S.C. Sec. 16(a)), and the relationship between Sections 5(a) and 5(b).

Movant contends *inter alia,* (1) that an order of the Federal Trade Commission, particularly if it is judicially enforced by a United States Court of Appeals, *is* available to a plaintiff as *prima facie* evidence of a violation of the antitrust laws under Section 5(a) of the Clayton Act, as amended, (2) That the tolling provisions of Sec. 5(b) are separate and independent of the considerations which govern the admissibility of such an order under Sec. 5(a), and (3) Therefore, the arguments introduced by Reynolds Metals Company with respects to Section 5(a) are without merit.

WHEREFORE, Highland Supply Corporation prays that this Court enter its order granting leave to file the attached brief.

Respectfully submitted,

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BRIEF OF HIGHLAND SUPPLY CORPORATION AS AMICUS CURIAE

Highland Supply Corporation, with leave of this Court, respectfully presents this brief in support of the Respondent, New Jersey Wood Finishing Company.

INTEREST OF AMICUS CURIAE

The interest of Highland Supply Corporation as *amicus curiae* is set forth in the motion for leave to file this brief *amicus* to which motion this brief is attached.

STATUTES INVOLVED

The Clayton Act, as amended, Act of July 7, 1955, c. 283, Sec. 2, 69 Stat. 283, 15 U. S. C., Sec. 16, provides in pertinent part:

> *"Judgment in favor of Government as evidence; suspension of limitations.*
>
> (a) A final judgment or decree heretofore or hereafter rendered in any or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto; *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.
>
> (b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter; *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

15 U. S. C., § 21 (g) (1), provides:[2]

> "(g) Any order issued under subsection (b) of this section shall become final—
>
> (1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the commission or board may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b) of this section."

SUMMARY OF ARGUMENT

1. Congress, in 1959, amended the Clayton Act by making orders of the Federal Trade Commission final without recourse to further proceedings in the courts. By reason of this change a final order of the Federal Trade Commission satisfies the requirements of Section 5 (a) of the Clayton Act, as amended, and is available to a private litigant in a subsequent treble-damage action as *prima facie* evidence that defendant has violated the antitrust laws.

2. In any event, the *prima facie* and *tolling* subsections of Section 5 of the Clayton Act, as amended, are independent of each other, the former depending upon the rules of evidence and the doctrine of estoppel, the latter requiring only the pre-existence of a government proceeding, the purpose of which is to prevent, restrain, or punish violations of the antitrust laws.

3. Recourse to the legislative history of the Clayton Act is unnecessary and unwarranted in the instant

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[2] This section was added by the 1959 amendment, Pub. L. 86-107, Act of July 23, 1959, 73 Stat. 243. Prior to this amendment, orders of the Federal Trade Commission under 15 U. S. C. 18 did not become final except upon a decree of enforcement by a Court of Appeals.

case because the language of the statutory provisions is plain on its face, and because most of the legislative history refers to sections of the Act which have since been replaced.

ARGUMENT

The 1959 Finalization Amendment to the Clayton Act has Cured the Objections Previously Raised by the Courts in Declining to Permit a Federal Trade Commission Order to be Introduced as Prima Facie Evidence in a Subsequent Private Treble-Damage Action.

Congress, in 1959, amended the Clayton Act by radically increasing the legal thrust of an order of the Federal Trade Commission. Public Law 86-107, Act of July 23, 1959, 73 Stat. 243. 15 U.S.C. 21(g)(1). This amendment provided that Clayton Act orders issued by the Commission "shall become final" when the time for seeking judicial review has expired i.e. 60 days. Accordingly, any case predating this amendment necessarily must look upon an F.T.C. order as lacking finality. Only a handful of reported cases touch upon this point and they are discussed below.

The first two decisions worthy of mention in connection with the *prima facie* evidence section are *Proper* v. *John Bene & Sons* (E. D.—N. Y., 1923), 295 F. 729, and *Brunswick-Balke-Collender* v. *American B&B Corp.* (C. A.—2, 1945), 150 F. 2d 69. In each of these cases there was an attempt to utilize an order of the Federal Trade Commission as *prima facie* evidence that there had been a violation of the antitrust laws.

In *Proper, supra,* the actual ruling of the Court was based on the fact that the only one of the defendants was before the FTC in the earlier proceeding. By way of *dicta* the Court laid down six criteria which it said had to be met in order to make the prior govern-

ment proceedings competent evidence in private antitrust damage cases.

One requirement was that the proceeding must be brought under the antitrust laws. In *Proper* the FTC proceeded under the Federal Trade Commission Act—not one of the antitrust laws. Another requirement was that the prior judgment or decree must be final. At the time of *Proper,* no FTC order became "final" until judicially enforced by a Circuit Court of Appeals. The law was changed in 1959, and Clayton Act orders of the FTC become final without judicial enforcement.

The Court in *Proper* also expressed doubt as to whether the language of the statute, "suit or proceeding in equity", as it existed in 1923, included a Federal Trade Commission proceeding.

Congress broadened this language in the 1955 amendment to "any civil or criminal proceeding." Even before this amendment, however, the doubts of the District Court in *Proper* were resolved by its own Court of Appeals. In its original opinion in *Brunswick-Balke, supra,* it held that an order of the Federal Trade Commission issued in a Clayton Act case was *prima facie* evidence of a violation of the law and admissible in a subsequent private damage suit, thus holding a Federal Trade Commission proceeding to be within the scope of Section 5. The Court on rehearing reversed itself solely because of its original misinterpretation of the 1938 amendment to the Federal Trade Commission Act which made orders under Section 5 of the Federal Trade Commission Act final. Clayton Act orders still were not final until Congress, in 1959, amended the Clayton Act.

There seems little doubt that if the 1959 amendment had been in effect at the time of the *Brunswick-Balke* case, the court's original decision would have stood, turning as it did solely on the question of "finality" of F. T. C. orders under the Clayton Act.

In *United States* v. *United Shoe Machinery Corp.*, 89 F. Supp. 349 (D. C.-Mass., 1950), the construction of Section 5 (a) and (b) was not before Judge Wyzanski. The question before the Massachusetts Court was the introduction of hearsay testimony. There was no question as to the introduction of a prior decree as *prima facie* evidence, nor of the tolling of the statute of limitations.

There is *dicta,* however, to the effect that the only difference between a decree of a district court and an order of the Federal Trade Commission is that the Commission's order cannot be used as *prima facie* evidence in a private treble damage suit.

Judge Wyzanski was speaking in 1950, prior to the 1955 amendments to Sections 5 (a) and (b) and the 1959 amendment "finalizing" the Clayton Act Orders in Federal Trade Commission proceedings. At the time of this opinion Judge Wyzanski was correct in his construction of Section 5 (a) because it required a *final* judgment or decree and Clayton Act orders in Federal Trade Commission proceedings were not final until 1959.

The following language of the Court is significant:

> "There is no difference between the substantive antitrust law applied by the Commission, and that applied by the Court. In a civil antitrust case the Government has the unfettered choice of going before a Commission or before the Court without a jury." (emphasis by the Court).

From the above quotation it is clear that Judge Wyzanski is of the opinion (1) that even prior to the 1955 amendment a proceeding before the Federal Trade Commission was a civil proceeding, and (2) that it was brought by the United States.

Similarly in *Wright* v. *Carter Products* (CA-2, 1957), 244 F. 2d 53.

The question of the construction of Sections 5 (a) (b) was not before the Court. Again, this case was decided in 1957 prior to the "finalizing" amendment of 1959. Furthermore, the Federal Trade Commission proceeding involved false advertising under Sec. 5 of the Federal Trade Commission Act and not a violation of the antitrust laws.

The Court held that the order of the Federal Trade Commission *could* be used as evidence of defendant's knowledge. By footnote, it was stated that the evidence was admitted only on the issue of notice, not as evidence of the product's propensities.

The *International Tag & S. Co.* v. *American Sales Book Co.* (S. D.-N. Y., 1943), 6 FRD 45, decision turned on the fact that the Federal Trade Commission Order was based on a consent decree, and because the prior Commission complaint was directed against law violations which occurred prior to the time the plaintiff in the treble damage action became a competitor. Since the Federal Trade Commission proceeding was disposed of by means of a consent order, it is obvious that it could not be used in evidence in a subsequent private treble damage suit.

Thus, the only Court of Appeals decisions which have considered the effect of Federal Trade Commis-

sion Orders since 1959 are *Highland Supply Corporation* v. *Reynolds Metals Company,* (CA-8, 1964) 327 F. 2d 725, and the instant case.

The Prima Facie and Tolling Subsections of the Clayton Act Are Independent of Each Other.

Sections 5 (a) and 5 (b) of the Clayton Act (15 U. S. C. 16 (a) and 16 (b), respectively) are complementary, but not necessarily co-extensive in their frame of reference. In *Union Carbide and Carbon* v. *Nisely* (C. A.—10, 1963), 300 F. 2d 561, the Court on page 569 said:

> "(1) The two paragraphs are indeed complementary and should be construed together. See: *Sun Theatre Corp.* v. *RKO Radio Pictures,* 7 Cir., 213 F. 2d 284; *Fifth & Walnut, Inc.* v. *Loew's Inc.,* 2 Cir. 176, F. 2d 587, 593. But, we do not think they are necessarily co-extensive in their frame of reference. The purpose of the first paragraph of Section 5 was 'to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions;' and to that end 'to confer, subject only to a defendant's enjoyment of its day in court against a new party, as large an advantage as the estoppel doctrine would afford had the Government brought suit. *Emich Motors Corp.* v. *General Motors,* 340 U. S. 558, 71 S. Ct. 408, 95 L. Ed. 534.'
>
> "The corollary purpose of the tolling provisions of the second paragraph of Section 5 is to vouchsafe the intended benefits of related government proceedings by suspending the running of the statute of limitations until the termination of the government proceedings, and allowing the private suitor one year thereafter in which to prepare and file his suit. The competency of a government judgment in a private suit is necessarily restricted

to the requirements of due process. But the tolling of the statute during the pendency of the government litigation is not so limited."

The differences between Sections 5(a) and 5(b) of the Clayton Act are obvious.

There are many situations where 5 (b) should be applied even though (a) would be inapplicable. For example, if the decree is based on a consent settlement, by its specific terms, Section 5 (a) is not applicable but still the statute of limitations would be tolled during the pendency of the proceedings. Likewise, in a criminal prosecution, if the result is an acquittal of the defendant, certainly the judgment could not be introduced as *prima facie* evidence of violation of the antitrust laws, still the statute of limitations would be tolled during the criminal proceedings.

I. Extensive Resort to the Legislative History of the Clayton Act Is Both Unnecessary and Unwarranted in Construing the Issues Presented in This Case.

Petitioner, and Reynolds Metals Company, as *amicus curiae,* have interlarded their respective briefs with extensive references to selected excerpts from the Legislative History of the Clayton Act of 1914. Much of this material is necessarily is restricted to the original language of the Calyton Act. The all-important 1955 and 1959 amendments effected changes which, in your *amicus'* view, are far more meaningful than historical observations about statutory language which has since been replaced.

Petitioner would dismiss the 1955 amendment to the Clayton Act as a mere modernization of language to conform to the terminology used in the Federal Rules

of Civil and Criminal Procedure. Even a casual examination of the sections in question will reveal that the 1955 amendment broadened the scope of coverage by the plain meaning of its language without reference to extrinsic sources of statutory construction.

Moreover, a legislative history so vast as that which resulted in the Clayton Act and its various amendments becomes a hopeless jumble from which any litigant can derive solace if he looks long enough.

For example, Reynolds' reference to the letter of Edward R. Johnson, Chairman of the American Bar Association Committee, and the testimony of Mr. Kenneth Royall[1] weakens its argument rather than strengthens it. In submitting testimony concerning proposed legislation, which ultimately became the 1955 amendment to Section 5 of the Clayton Act, both Mr. Johnson and Mr. Royall raised the question that this legislation might be construed as including Federal Trade Commission proceedings, and requested that the proposed legislation be amended so as to specifically exclude Federal Trade Commission proceedings. Notwithstanding this request, Congress enacted legislation without excluding Federal Trade Commission proceedings. This omission is particularly illuminating, in view of the fact that Section 5 (a) does contain two specific exclusions, and Section 5 (b), one.

It is significant that Congress, knowing of this view, refrained from excluding proceedings before the Federal Trade Commission, even though Congress *did* provide that judgments or decrees entered in actions under section 15a could not be used as *prima facie* evidence.

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[1] Reynolds Metals Company's Brief as Amicus Curiae, pp. 59-62.

The only exceptions to the use of final judgments or decrees set out in 15 USC 16 (a) are:

> "(1) Consent judgments or decrees entered before any testimony has been taken," and
>
> "(2) Judgments or decrees entered in actions under Section 15 (a) of this title."

The second exclusion is also specifically set out in Section 15 (b).

Under the maxim, *Expressio unius est exclusio alterius,* it should be concluded that Congress intended to exclude *only* these two classes of judgments or decrees. This principle is particularly applicable where, as here, the legislative history clearly shows that Congress was on notice as to the possible effect of the change in language. *So. Coast Corp.* v. *Sinclair* (CA-5, 1950), 181 F. 2d 960, 961; *Midland Corp.* v. *Ickes* (CA-8, 1942), 125 F. 2d 618, 625.

Furthermore, the reports, hearings and debates are replete with the words "government proceedings," and are not limited to suits by the Attorney General and refer to "benefits of the government proceedings" and are not limited to the one benefit of the use of the decree as *prima facie* evidence.

The Courts are loath to consider legislative history as an aid to statutory construction, except as a last resort. Judge Hulen, in the case of *Securities and Exchange Commission* v. *Ralston Purina Co.* (E. D. Mo., 1952), 102 F. Supp. 964, said:

> "We are urged to follow these extra-statutory pronouncements in determining the meaning of the statute. The practice does not appeal to us. We think it should be resorted to only in cases of extreme necessity when the recognized rules for

statutory construction fail of their purpose. Language used by Congressional Committees is often loose. That observations of Congressional Committees will thereafter be used by the Courts to determine the meaning of laws passed by Congress cannot be said to have been in the minds of the Committee at the time of their pronouncements. Congress does not purposely pass a vague law" (966-67).

Mr. Justice Jackson joined by Mr. Justice Minton in the case of *Schwegmann Bros.* v. *Calvert Corp.*, 341 U.S. 386, (1951), stated:

"Resort to legislative history is only justified where the face of the Act is inescapably ambiguous and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared. I cannot deny that I have sometimes offended against that rule. But to select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress in one of its important functions. The Rules of the House and Senate, with the sanction of the Constitution, require three readings of an Act in each House before final enactment. That is intended, I take it, to make sure that each House knows what it is passing and passes what it wants, and that what is enacted was formally reduced to writing. It is the business of Congress to sum up its own debates in its legislation. Moreover, it is only the words of the bill that have presidential approval, where that approval is given. It is not to be supposed that, in signing a bill, the President endorses the whole Congressional Record. For us to undertake to reconstruct an enactment from legislative history is merely to involve the Court in political contro-

versies which are quite proper in the enactment of a bill but should have no place in its interpretation.

Moreover, there are practical reasons why we should accept whenever possible the meaning which an enactment reveals on its face. Laws are intended for all of our people to live by; and the people go to law offices to learn what their rights under those laws are. Here is a controversy which affects every little merchant in many States. Aside from a few offices in the larger cities, the materials of legislative history are not available to the lawyer who can afford neither the cost of acquisition, the cost of housing, or the cost of repeatedly examining the whole congressional history. Moreover, if he could, he would not know any way of anticipating what would impress enough members of the Court to be controlling. To accept legislative debates to modify statutory provisions is to make the law inaccessible to a large part of the country.

By and large, I think our function was well stated by Mr. Justice Holmes: 'We do not inquire what the legislature meant; we ask only what the statute means.' Holmes, *Collected Legal Papers*, 207. See also *Soon Hing* v. *Crowley*, 113 U. S. 703, 710-711. And I can think of no better example of legislative history that is unedifying and unilluminating than that of the Act before us" (pp. 395, 396 and 397).

In view of the foregoing, we submit that recourse to legislative history is both unnecessary and unwarranted in the instant case.

CONCLUSION

The decision of the Third Circuit is completely sound and represents a natural and inevitable progression in the development of private enforcement of the antitrust laws. It should be affirmed.

Respectfully submitted,

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